STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
R. BANDSTRA, P.J., W. WHITBECK, and D. OWENS, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court
No. 120630

RICHARD MENDOZA,

Defendant-Appellee.
_____/

Court of Appeals No. 220272
Circuit Court No. 97-010292-FH

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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STATEMENT OF QUESTION PRESENTED

I. WHETHER MANSLAUGHTER IS A LESSER-INCLUDED OFFENSE OF MURDER UNDER MCL 768.32(1)?

The People of the State of Michigan contend the answer is, "yes."

Defendant will contend the answer is, "yes."

Amicus contends the answer is, "yes."

STATEMENT OF FACTS

In lieu of its own statement of facts, Amicus adopts the statement of facts contained in Appellant's Brief.

ARGUMENT

I. MANSLAUGHTER IS A LESSER-INCLUDED OFFENSE OF MURDER UNDER MCL 768.32(1).

Introduction

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), this Court held that MCL 768.32 permits a jury to consider only those less serious offenses that are necessarily included within the charged offense, i.e. permits only lesser-included offenses not lesser-related offenses to be considered. The question in this case is whether manslaughter is a lesser-included offense of murder. Amicus submits that the answer is, "yes". The crimes of murder and manslaughter are both defined by the common law. At common law manslaughter was considered a lesser-included offense of murder. Because the rule announced in *Cornell* mirrors the common law rule regarding lesser-included offenses, Michigan should also mirror the common law view that manslaughter is a lesser-included offense of murder.

Discussion

In *Cornell, supra*, this Court held that, pursuant to MCL 768.32(1), a jury may only consider the defendant's guilt of the charged offense and those lesser offenses necessarily included in the charged offense and supported by the evidence[1].

[1] Amicus is confining its argument in this case to the issue of whether the lesser offense is lesser-included. The issue concerning factual support for the lesser offense is thoroughly addressed in the Appellant's brief and will not be addressed here.

This view mirrors the common law rule. The common law definition of lesser-included offenses was that the lesser must be such that it is impossible to commit the greater without first committing the lesser. *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975)[citing 4 Wharton, Criminal Law & Procedure (12th ed) § 1799]. At common law only such lesser-included offenses could be considered by the jury. *Id.*

"Murder" in Michigan is a common law offense. *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998). It is defined by common law as the unlawful killing of one human being by another with malice aforethought. *Goecke, supra* at 463-464; Perkins & Boyce, Criminal Law (3d ed), p 57. MCL 750.316 and MCL 750.317, which address first and second degree murder, do not purport to define the crime of "murder", but only graduate the punishment for the common law offense. *People v Aaron*, 409 Mich 672, 719; 299 NW2d 304 (1980).[2]

Manslaughter in Michigan is also defined by the common law. *People v Datema*, 448 Mich 585, 593-594; 533 NW2d 272 (1995). MCL 750.321 prescribes the penalty for manslaughter, leaving the definition to be found at common law. *People v Townes*, 391 Mich 578, 588-589; 218 NW2d 136 (1974); *Datema, supra* at 593-594. Common law manslaughter is any homicide that is not murder but not innocent. *Datema, supra* at 594;

[2] First degree murder in Michigan, MCL 750.316, is a common law or second-degree murder plus an element, namely premeditation or [attempted] perpetration of a listed felony. *People v Carter*, 395 Mich 434, 437-438; 236 NW2d 500 (1975); see also *People v Allen*, 390 Mich 383; 212 NW2d 21 (1973)[adopting the dissent of then-Judge Levin reported at 39 Mich App 483; 197 NW2d 874 (1972), see pp 501-502 of Levin's opinion].

Perkins & Boyce, Criminal Law (3d ed) p 83. At common law manslaughter was divided into two categories: voluntary and involuntary manslaughter. *Townes, supra* at 589; *Datema, supra* at 594. This distinction was purely factual, because the punishment was the same for both. Perkins & Boyce, Criminal Law (3d ed), p 83.

Both manslaughter offenses are distinguished from the higher crime of murder by the absence of malice. *Townes, supra* at 589; Perkins & Boyce at 82-83. Malice "elevates" manslaughter to murder. See *Aaron, supra* at 714.

Voluntary manslaughter reflects the negation of malice by provocation and heat of passion. *Townes, supra* at 589-590; see *People v Ryczek*, 224 Mich 106, 109-110; 194 NW 609 (1923).[3]

Involuntary manslaughter, which has been characterized as a catch-all crime covering all non-innocent homicides that are not murder or voluntary manslaughter,

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[3] As noted in Appellant's brief, the elements of voluntary manslaughter have often been mischaracterized. For example, in *People v Elkhoja,* 251 Mich App 417, 445; 651 NW2d 408 (2002), lv gtd 467 Mich 915 (2002), the Court of Appeals described the elements of voluntary manslaughter as follows:

> The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions.

However, "heat of passion" and "adequate provocation" are not, in a true sense, "elements" of the offense of voluntary manslaughter. Rather, the existence of "heat of passion" and "adequate provocation" serve to *negate* the element of malice necessary to convict a defendant of murder. See *Holloway v State,* 170 Ind App 155, 159; 352 NE2d 523 (1976). In other words, these descriptive phrases are "simply a way of saying that the element of malice required for murder in the second degree and also murder in the first degree is not required." *Jahnke v State,* 692 P2d 911, 919 (Wyo 1984).

Datema, supra at 594-595; Perkins & Boyce, Criminal Law (3d ed), pp 104-105, reflects the negation of malice by a mental state less heinous than malice, *Datema, supra* at 606; *Ryczek, supra* at 109-110, i.e. an unintended death resulting from an unlawful act not naturally tending to cause death or great bodily harm or from criminal negligence. *Townes, supra* at 590; *People v Herron*, 464 Mich 593, 604-605; 628 NW2d 528 (2001).[4]

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[4] A careful analysis of the elements of involuntary manslaughter, such as that done by the Fifth Circuit Court of Appeals in *United States v Browner,* 889 F2d 549, 553 (CA 5, 1989), in analyzing the federal involuntary manslaughter statute, reveals how involuntary manslaughter in Michigan is a lesser-included offense of murder:

> In contrast to the case of voluntary manslaughter . . . the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently capable to reach the traditional malice elements. At common law, the *physical* element of involuntary manslaughter remains the same as the physical element of murder: unlawfully causing the death of another. But the requisite mental state is reduced to "gross" or "criminal" negligence, a culpability that is far more serious than ordinary tort negligence but still falls short of that most extreme recklessness and wantonness required for "depraved heart" malice. *E.g.,* LaFave Scott, *supra,* § § 7.1, 7.12(a). [18 USC] Section 1112 adopts this common-law approach . . . .
>
> * * *
>
> Thus, involuntary manslaughter under the federal statute differs from murder only in that it requires a reduced level of culpability in committing the same physical act. As a matter of black letter law, that is sufficient to make it a lesser included offense. *See, e.g.,* Model Penal Code § 1.07(4)(c) (1985).

In footnote three of its opinion, the Fifth Circuit then rejected the view that the mental state for manslaughter is different from—not lesser to—the mental state for murder:

> As an abstract theoretical matter, one might argue that the lesser culpability of "gross negligence" is a culpability that is *different* from, and not a subset of the "intent" or "depraved heart" culpability required for murder. One might conclude from this philosophical distinction that the strict literal force of the elements (continued . . .)

The history of the development of the crime of manslaughter at common law was well summarized by Justice Nix of the Pennsylvania Supreme Court in *Commonwealth v Jones*, 457 Pa 563, 566-567; 319 A2d 142, 144-145 (1974),

> Until near the end of the Fifteenth century all felonious homicides were punishable by death and by forfeiture of lands and goods; although the accused's life might be saved if he fell within the scope of benefit of clergy. As yet, it had not been recognized that homicides feloniously perpetrated might differ in degree. Thus, manslaughter as a crime distinguishable from the more serious offense of murder did not exist. However, a series of statutes, during the period from 1496 to 1547 withdrew benefit of clergy from murder with malice aforethought (malice prepensed). This resulted in a division of felonious homicide into two categories, that with and without malice aforethought. In the first, designated as murder, the benefit of clergy was excluded and the punishment was death. The second, homicide without malice, subsequently manslaughter, was not capital even though intentional, if committed in the heat of passion upon adequate provocation. The English court's problem was to determine when such passion should suffice to avoid the death penalty.
>
> In addition to creating a distinction in the law of felonious homicide between the capital crime of murder and the non-capital crime of manslaughter, it was established that a person indicted for the murder of another with malice aforethought might be found guilty of manslaughter. It was reasoned that the offenses did not differ in *kind* or *nature* but only in degree – not in substance of the fact from murder, but

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test adopted by the Supreme Court in *Schmuck, supra,* modifies the traditional rule regarding offenses that differ only in the level of culpability. But while this concept of "lesser included" culpability may be a legal fiction, it is a deeply entrenched one, and we do not believe that that the Supreme Court intended to uproot it with its decision in *Schmuck.* This reading of *Schmuck* is supported by the Court's heavy reliance on tradition in its decision to adopt the elements test in the first place. *See Schmuck, 109 S. Ct. at 1450-52.*

(emphasis original)

> only in the *ensuing circumstances*, a variance as to which did not hurt the verdict [citations omitted].
>
> (emphasis in original)(footnotes omitted)

Thus, as Justice Nix noted, at common law manslaughter was a lesser-included offense of which a defendant could be convicted if tried for murder, a point also made by Justice Saunders of the Washington Supreme Court in his opinion in *State v Tamalini,* 134 Wash 2d 725, 738-739; 953 P2d 450 (1998)[5]:

> The common law held murder and manslaughter were varying degrees of the same offense, homicide or unlawful killing. The only difference between the two is mental culpability. See 1 Sir Matthew Hale, Knt., The History of the Pleas of the Crown 449 (1st Am. ed. 1847)("Murder and manslaughter differ not in kind or nature of the offense, only in the degree . . . ."); *State v. Utter, 4 Wash. App. 137, 139-40, 479 P.2d 946 (1971)*("The actus reus is the culpable offense act itself . . . . In the present case, the appellant was charged with second-degree murder and found guilty of manslaughter. The actus reus of both is the same homicide."); *State v. Ieremia, 78 Wash. App. 746, 754 n. 2, 899 P.2d 16 (1995)* ("some lesser degree crimes simply involve a less culpable mental state homicide, for example"), review denied, *128 Wash. 2d 1009, 910 P.2d 481 (1996); People v. Ray, 14 Cal. 3d 20, 533 P.2d 1017, 1021, 120 Cal. Reptr. 377 (1975)* ("The critical factor in distinguishing the degrees of a homicide is thus the perpetrator's mental state.") Thus, all authority agrees manslaughter is an inferior degree of murder.
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> (footnotes omitted)

[5] The precise issue the Washington Supreme Court confronted in *Tamalini* was whether a statutory version of manslaughter was an inferior degree of statutory *felony* murder.

An excellent summary of the common law on this point can be found in Shellenberger & Strazella, *The Lesser Included Offense Doctrine and the Constitution: the Development of Due Process and Double Jeopardy Remedies*, 79 Marq L Rev 1, 98-105 (1995). There the authors note, in pertinent part,

> As early as 1724, Hawkins' Treatise of the Pleas of the Crown recognized that on an indictment charging murder courts upheld jury findings that defendants were not guilty of murder, but guilty of manslaughter, or other lesser homicides, if the evidence warranted. . . . Joseph Chitty's Practical Treatise on the Criminal Law stated that "without the addition of several counts, the jury may frequently find the prisoner guilty only of a minor offense included in the charge. . ." and, "where the accusation includes an offense of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious." Among the examples given were manslaughter on a murder indictment, theft of a robbery indictment, and others like those mentioned by Hawkins and Hale.
>
> These early treatises lend support to the [view] that the LIO [lesser included offense] rule was originally intended to benefit the prosecution when its evidence failed to prove some element of the offense charged, but nonetheless proved a lesser offense. The treatises speak of the jury having the authority to convict of a lesser offense, without mentioning that the defendant had a right to insist that the jury be told it could consider the alternative of acquitting on the greater and convicting on the lesser only. Hawkins 1724 edition is the most explicit on this point, stating that when the jury finds a defendant not guilty of murder, "they are not bound to make any Inquiry, whether he be guilty of Manslaughter, But that if they will they may, according to the Nature of the Evidence, find him guilty of Manslaughter. . .". . .
>
> Although this view of the LIO doctrine emphasizes the benefit to the prosecution, the effect of or reason for the benefit was that the jury's lesser offense verdict was a more accurate assessment of the defendant's guilt as shown by the evidence. The LIO rule benefited the prosecution, but the

underlying interest or value served by it was the reliability of the guilt determining process. . .

The common law treatises discussed above collected numerous cases to support the propositions stated. . . . In *Salisbury Case*[351], an English court in 1816 upheld a conviction of manslaughter on an indictment charging murder, over the defendant's objection. Basically, the court considered malice prepense simply as the element the aggravated a killing to murder, so that if the jury found defendant guilty of the substance, the killing, but not this additional element, a manslaughter verdict was proper.[352] Although *Salisbury case* is from the early nineteenth century, it relied on an even earlier, seventeenth century decision.[353]

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[351] Matters of the Crown Happening at Salop (*Salisbury Case*), 75 Eng Rep 152 (KB 1816).

[352] Similar to the reasoning articulated by the treatise writers discussed above, the court reasoned:

> The substance of the matter was, whether he killed him or not, and the malice prepense is but matter of form or the circumstance of killing. And although the malice prepense makes the fact more odious,. . . yet it is nothing more than the manner of the fact, and not the substance of the fact, . . . if the jurors find the substance and not the manner, yet judgment shall be given according to the substance.

Salisbury Case, 75 Eng Rep at 160.

[353] *MacKalley's Case*, 77 Eng Rep 824, 828, 832 (KB 1611). This case did not involve a lesser offense verdict, but it's dictum is relevant. In the course of discussing material and nonmaterial variances between the indictment and the evidence, the court stated:

> So if one is indicted of the murder of another upon malice prepense, and he is found guilty of manslaughter, he shall have judgment upon this verdict, for the killing is the substance, and the malice prepense the manner of it; and when the matter is found, judgment shall be given

> thereon, although the manner is not precisely pursued. . . .
>
> *Id.* at 832-33 . . .
>
> Shellenberger & Strazella, *supra* at 98-102 (additional footnotes omitted).

Because the rule announced in *Cornell* mirrors the common law lesser-included offense rule, because the crimes of murder and manslaughter are defined by the common law, and because manslaughter was viewed as a lesser-included offense of murder at common law, Michigan should recognize manslaughter as a lesser-included offense of murder.[6] In fact, in *Cornell, supra* at 343, this Court quoted with approval the following language from *Hanna v People*, 19 Mich 316 (1869), discussing the precursor to MCL 768.32(1), and stating that manslaughter may be considered as a lesser-included offense of murder,

> [N]o one can doubt that without this provision, the common law rule would, under the statute, dividing murder into degrees, have authorized a conviction not only for murder in the second degree, but for manslaughter also, under an indictment for murder in the first degree, all these offenses being felonies included in the charge.

This Court should now reaffirm that manslaughter is a lesser-included offense of murder.

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[6] Aside from accurately mirroring the common law roots of murder and manslaughter, recognizing manslaughter as a lesser-included offense of murder and giving the jury a manslaughter instruction in a murder case under *Cornell* when it is supported by the evidence "protects both the defendant and the prosecution against a verdict contrary to the evidence . . . [by assuring], in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." *People v Breverman,* 19 Cal 4th 142, 161; 960 P2d 1094 (1998).

RELIEF

WHEREFORE, Prosecuting Attorneys Association of Michigan, by David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, respectfully requests that this Court reaffirm that manslaughter is a lesser-included offense of murder.

Respectfully Submitted,

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